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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/777,299	02/12/2004	Paul E. Share	13015/39281	5310
62127 7590 10/08/2010 VALSPAR SOURCING, INC. 901 3rd Avenue South PO Box 1461 MINNEAPOLIS, MN 55440-1461				
EXAMINER				
HUSON, MONICA ANNE				
ART UNIT		PAPER NUMBER		
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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/777,299

Applicant(s)

SHARE ET AL.

Examiner

MONICA A. HUSON

Art Unit

1791

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 21 September 2010.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-3,5-12,14-21 and 25-33 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-3,5-12,14-21 and 25-33 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ ~~Notice of Informal Patent Application~~
- 6) ☐ Other: _____

DETAILED ACTION

It is noted that this application has been transferred from Examiner Daniels to Examiner Huson.

Claim Objections

Claims 14 and 15 are objected to because of the following informalities: they depend from claim 13, which has been cancelled. For purposes of examination, claims 14 and 15 will be held to depend from claim 12. Appropriate correction is required.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-3, 5-12, 14-21, and 25-33 are rejected under 35 U.S.C. 103(a) as obvious over Collette et al. (U.S. Patent 5,759,653), in view of Venkateshwaran et al. (U.S. Patent 5,744,056). Regarding Claims 1, 25, and 27, Collette et al., hereafter "Collette," teach a method comprising the steps of: (a) forming a preblend/masterbatch (col 5 lines 6-7) comprising: a diluent polyester (col 5 line 17), a polyamide material (col 5 line 18), and an oxygen scavenging material (col 5 line 19) having the claimed concentration (10:30-37 and Claim 16); providing a base/core layer polyester (col 5 line 31); introducing the preblend and the base polyester into a molding apparatus to permit melting and admixing of the preblend and the base polyester (col 5 lines 29-65); injection molding or extruding the admixture in the apparatus to provide a preform (fig 3, 59); and expanding the preform to provide a plastic container having a barrier layer formed from the admixture of the preblend and polyester (fig 6 & 7). Collette does not show activation of the oxygen scavenging material by filling. Venkateshwaran et al.,

hereafter "Venkateshwaran," show that it is known to make a packaging article wherein activation of the oxygen scavenging composition occurs after filling the product, i.e. placing the product into use (Column 11, lines 59-67; Column 12, lines 1-5; Column 14, lines 50-66). It would have been prima facie obvious to one of ordinary skill in the art at the time the invention was made to use Venkateshwaran's activation step in place of Collette's activation step in order to avoid taking special steps to maintain low moisture levels to preserve the package (see Venkateshwaran, Column 11, lines 66-67; Column 12, lines 1-2), and because selection of any order of performing process steps is prima facie obvious in the absence of new or unexpected results (MPEP 2144.04 (IV)(C)).

As to Claim 2, Collette shows the process as claimed as discussed in the rejection of Claim 1 above, including a method wherein the plastic container is a multilayer plastic container (fig 7), meeting applicant's claim.

As to Claim 3, Collette shows the process as claimed as discussed in the rejection of Claim 1 above, including a method wherein monolayer plastic containers are known and conventional in the prior art (col 1 lines 47-51), meeting applicant's claim.

As to Claims 5 and 26, Collette shows the process as claimed as discussed in the rejection of Claim 1 above, however he does not discuss storage evaluations or comparisons. However, the references teach all the claimed ingredients, process steps, and process conditions and thus, the claimed effects and physical properties would implicitly be achieved by carrying out the disclosed process. If it is applicant's position that this would not be the case: (1) evidence would need to be provided to support applicant's position, and (2) it would be the examiner's position that the application contains inadequate disclosure in that there is no teaching as to how to obtain the claimed properties and effects by carrying out only these steps.

As to Claim 6, Collette shows the process as claimed as discussed in the rejection of Claim 1 above, including a method wherein the preblend is in a form of solid particles (col 5 line 26), meeting applicant's claim.

As to Claim 7, Collette shows the process as claimed as discussed in the rejection of Claim 1 above, including a method wherein the diluent polyester is present

in the preblend in an amount of about 25% to about 75%, by weight of the preblend (col 16 line 3-7), meeting applicant's claim.

As to Claim 8, Collette shows the process as claimed as discussed in the rejection of Claim 1 above, including a method wherein the diluent polyester comprises polyethylene terephthalate and polyethylene naphthalate (col 14 line 22-27), meeting applicant's claim.

As to Claim 9, Collette shows the process as claimed as discussed in the rejection of Claim 7 above, including a method wherein the base polyester contains a substantial portion virgin PET, which would implicitly be bottle grade (16:12-14). It is noted that Claim 19 of Collette is drawn to "on the order of 50% post consumer PET" (15:15-20). However, the Examiner's position will be that the additional post consumer PET does not materially affect the basic and novel characteristics of the claimed invention because it provides PET material which would have the same or substantially the same structure as the virgin material.

As to Claim 10, Collette shows the process as claimed as discussed in the rejection of Claim 1 above, including a method wherein the polyamide material is present in the preblend in an amount of about 25% to about 75%, by weight of the preblend (col 15 line 7-11), meeting applicant's claim.

As to Claim 11, Collette shows the process as claimed as discussed in the rejection of Claim 9 above, including a method wherein the polyamide material comprises a polymer containing m-xylylenediamine monomer units (col 10 line 51), meeting applicant's claim.

As to Claim 12, Collette shows the process as claimed as discussed in the rejection of Claim 9 above, including a method wherein the polyamide material comprises a polymerization product of m-xylylenediamine and adipic acid (col 10 lines 51-52), meeting applicant's claim.

As to Claims 14-15, Collette shows the process as claimed as discussed in the rejection of Claim [12] above, including a method wherein the oxygen scavenging material comprises cobalt or a metal complex thereof (col 10 lines 24-37), meeting applicant's claim.

As to Claims 16, and 31-33, Collette shows the process as claimed as discussed in the rejection of Claim 1 above, including a method using a polyamide material present in the preblend in an amount of about 10-50% by weight of the preblend (col 15 line 7-11), and the polyester comprising PET used in a percentage of about 50-90% (col 15, lines 3-4), wherein the transition metal oxygen scavenging material present in the preblend in an amount of about 50 to about 1000 parts per million (col. 10, lines 23-37). Further, Collette shows that monolayer plastic containers are known and conventional in the prior art (col 1 lines 47-51), meeting applicant's claim.

As to Claim 17, Collette shows the process as claimed as discussed in the rejection of Claim 1 above, including a method wherein the base polyester is in a form of solid particles (col 5 lines 59-67), meeting applicant's claim.

As to Claim 18, Collette shows the process as claimed as discussed in the rejection of Claim 9 above, including a method wherein the preblend and the base polyester are admixed in an amount of about 0.5% to about 20%, by weight, of the preblend, and about 80% to about 99.5%, by weight, of the base polyester (col 16 lines 8-11), meeting applicant's claim.

As to Claim 19, Collette shows the process as claimed as discussed in the rejection of Claim 9 above, including a method wherein the base polyester is polyethylene terephthalate (col 5 line 31), meeting applicant's claim.

As to Claim 20, Collette shows the process as claimed as discussed in the rejection of Claim 1 above, including a method wherein the polyethylene terephthalate comprises a virgin bottle grade polyethylene terephthalate, a post consumer grade polyethylene terephthalate, or a mixture thereof (col 5 lines 11-32), meeting applicant's claim.

As to Claim 21, Collette shows the process as claimed as discussed in the rejection of Claim 1 above, including a method wherein the preform contains about 10 to about 80 ppm, by weight, of the oxygen scavenging material (col 1 line 53), meeting applicant's claim.

As to Claims 28-29, Collette shows the process as claimed as discussed in the rejection of Claim 27 and 9, respectively, above, including a method wherein the

preblend comprises a transition metal oxygen scavenging material in an amount of about 50 to about 1000 parts per million (col. 10, lines 23-37), the polyamide material is present in the preblend in an amount of about 10-50% by weight of the preblend (col 15 line 7-11), and the polyester comprising PET used in a percentage of about 50-90% (col 15, lines 3-4), meeting applicant's claim.

As to Claim 30, Collette shows the process as claimed as discussed in the rejection of Claim 9 above, including a method wherein the base polyester contains virgin polyethylene terephthalate (col 16, lines 12-14), meeting applicant's claim.

Response to Arguments

Applicant's arguments filed 21 September 2010 have been fully considered but they are not persuasive.

It is initially noted that footnote (1) refers to an Appendix A in the response dated November 17, 2009, however that Appendix A was filed with the response dated November 17, 2008.

The arguments with regard claims 1, 27, and 31 as to when the activation of Collette takes place, relative to that which is claimed, have been addressed above in a rejection on new grounds.

The arguments with respect to the amount of oxygen scavenging material are not persuasive. Applicant contends that Collette's disclosure of the amount of oxygen scavenging material are only with respect to his first blend and not the masterbatch. This is not persuasive because claim 1 does not require an amount of oxygen scavenging material with respect to the masterbatch, only with respect to the preblend. Therefore, as Collette discloses an amount of oxygen scavenging material with respect to the first blend, i.e. preblend, it is maintained that Collette suggests this feature.

Conclusion

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

U.S. Patent Application Publication 2002/0037377 to Schmidt et al. (see Abstract)

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Monica Huson whose telephone number 571-272-1198. The examiner can normally be reached on Monday - Friday, 7:30 am - 4:00 pm. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Christina Johnson can be reached on (571) 272-1176. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Monica A Huson/
Primary Examiner, Art Unit 1791